STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 11, 2014
v	No. 316845 Saginaw Circuit Court
DERRICK BERETE LISTER, Defendant-Appellant.	LC No. 12-037409-FC

Before: MURRAY, P.J., and DONOFRIO and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury convictions of felon in possession of a firearm, MCL 750.224f; conspiracy to commit first-degree home invasion, MCL 750.110a(2); first-degree home invasion, MCL 750.110a(2); conspiracy to commit assault with intent to do great bodily harm less than murder, MCL 750.84; assault with intent to do great bodily harm less than murder, MCL 750.84;[1] carrying a firearm with unlawful intent, MCL 750.226, and three counts of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. We affirm defendant's convictions but remand for correction of the judgment of sentence.

The charges against defendant resulted from an incident in which defendant and another man entered a home, which was occupied by several women and children, and fired gunshots. Before trial, the trial court granted defendant's motion for the appointment of an investigator because of difficulties in contacting several individuals, in accessing police records, and in gathering information regarding alibi evidence.

At trial, Catherine Williams, Ashley Williams, and Chanquiece Moton testified that on the evening of November 24, 2011, they were at Ashley Williams's home when defendant knocked on the door. Ashley Williams answered the door, and defendant entered the home,

[1] The assault convictions were lesser included offenses of the charged crimes of conspiracy to commit assault with intent to murder, MCL 750.83, and assault with intent to murder, MCL 750.83.

pointed a gun at Ashley Williams, and stated that he was going to kill her.[2] Ashley Williams ran into the kitchen; defendant pursued her and fired shots in her direction. The witnesses stated that a second man, Willie Youngblood, also entered the home and began shooting. Moton stated that defendant also threatened to kill her and Ashley Williams's children. Catherine Williams and Ashley Williams showed the police a photograph of defendant they found on Facebook.

Mary Jones, defendant's girlfriend of three years, testified that she and defendant lived in Columbus, Ohio, and were visiting Saginaw, Michigan at the time the incident occurred. Jones testified that she and defendant argued about defendant's sexual encounter with Ashley Williams. Jones testified that on the day of the incident, she dropped defendant off at Youngblood's home at 11:00 a.m. and she went to her aunt's home. She and defendant left for Ohio that evening, and a few hours later, at 1:29 a.m., their car was stopped by police in Ohio for missing taillights.

The jury convicted defendant of felon in possession of a firearm, conspiracy to commit first-degree home invasion, first-degree home invasion, conspiracy to commit assault with intent to do great bodily harm less than murder, assault with intent to do great bodily harm less than murder, carrying a firearm with unlawful intent, and three counts of felony-firearm.

I. *BATSON* CHALLENGE

On appeal, defendant argues that the prosecutor's exercise of a peremptory challenge to strike the only black male from the jury panel violated defendant's equal protection rights as articulated in *Batson v Kentucky*, 476 US 79; 90 L Ed 2d 69; 106 S Ct 1712 (1986), and that he is entitled to a new trial. We disagree.

The three parts of a *Batson* challenge are reviewed as follows: the first part is a mixed question of fact and law that is subject to both a clear error and de novo review, respectively; the second step is reviewed de novo; and the third step is reviewed for clear error. *People v Knight*, 473 Mich 324, 342-345; 701 NW2d 715 (2005). "Clear error exists when the reviewing court is left with a definite and firm conviction that a mistake was made." *People v McDade*, 301 Mich App 343, 356; 836 NW2d 266 (2013).

A prosecutor cannot exercise a peremptory challenge to remove a prospective juror solely on the basis of the person's race. *Batson*, 476 US at 89. The *Batson* Court set out a three-step process for determining the constitutional use of a peremptory challenge. First, the party objecting to the use of the peremptory challenge must make a prima facie showing of discrimination. *Id.* at 96. To do so the party

> must show that: (1) the defendant is a member of a cognizable racial group; (2) peremptory challenges are being exercised to exclude members of a certain racial group from the jury pool; and (3) the circumstances raise an inference that the

[2] Ashley Williams stated that she knew defendant because they had had a sexual encounter shortly before the incident occurred.

exclusion was based on race. [*People v Bell*, 473 Mich 275, 282-283; 702 NW2d 128 (2005).]

Then, once the opponent of the peremptory challenge has made a prima facie showing, the burden shifts to the challenging party to put forth a neutral reason for the challenge. The explanation must be related to the case being tried. If the challenging party fails to put forth a neutral explanation, the peremptory challenge will be denied. *Id*. at 283.

Finally, the trial court must determine whether the opponent of the challenge has established purposeful discrimination. *Batson*, 476 US at 98. Purposeful discrimination is established if the trial court finds that the proffered reason for the challenge is pretextual. *Bell*, 473 Mich at 283. In other words, the establishment of purposeful discrimination "comes down to whether the trial court finds the . . . race-neutral explanations to be credible." *Miller-El v Cockrell*, 537 US 322, 339; 123 S Ct 1029; 154 L Ed 2d 931 (2003). If the trial court determines that the proffered reason is pretextual, the peremptory challenge will be denied. *Batson*, 476 US at 100.

During voir dire, the prosecution exercised one of its peremptory challenges on the sole black male from the jury pool. Because the prosecutor offered a race-neutral explanation and the trial court ruled on whether the explanation was a pretext, the first step is moot, and our analysis begins with the second step. *Knight*, 473 Mich at 338. When defendant objected to the use of the peremptory challenge on this potential juror, the prosecutor stated that he used the challenge because of the gentleman's statement that he would require scientific evidence in order to convict. This is a race-neutral reason and satisfies step two of the *Batson* process.

For the final step of the *Batson* process, the trial court concluded that the prosecutor's reason for dismissing the gentleman was not pretextual. After our review of the record, we conclude that the trial court did not clearly err in making this determination.

The prosecutor's decision to excuse the sole black male from the jury pool was based on the following exchange:

> [Prosecutor]: How many of you expect to see some kind of scientific evidence in this case that's going to be the—the clincher? Do you, Mr. Vaughn?
>
> JUROR NO. 13: No.
>
> [Prosecutor]: How about you, Ms. Morris.
>
> JUROR NO. 7: No.
>
> [Prosecutor]: Ms. Stinson?
>
> JUROR NO. 4: No.
>
> [Prosecutor]: How many of you expect to see some kind of scientific evidence in this case? DNA, fingerprints, something like that? Does anybody? Mr.

Vaughn, you're shaking your head, raising your hand. Are you going to be disappointed if you don't?

JUROR NO. 13: No, not really.

[Prosecutor]: *Are you going to hold it against me and the People of the State of Michigan if you don't see or hear that kind of evidence?*

JUROR NO. 13: *Yes.*

[Prosecutor]: *So you do expect to hear or see that?*

JUROR NO. 13: *Yes.*

[Prosecutor]: And so if you don't see or hear it, you're going to be disappointed?

JUROR NO. 13: Not disappointed so much as it's got to prove him guilty.

[Prosecutor]: I'm sorry, sir, I'm having trouble hearing you.

JUROR NO. 13: I said, like, if I don't see the evidence, like to prove him guilty, I'm going to find him not guilty.

[Prosecutor]: Well, you do realize that there are kinds of evidence other than scientific evidence; don't you?

JUROR NO. 13: Yes.

[Prosecutor]: I mean, like eyewitness evidence?

JUROR NO. 13: Yes.

[Prosecutor]: Is eyewitness evidence any good to you?

JUROR NO. 13: It depends.

[Prosecutor]: Huh?

JUROR NO. 13: You can't believe what everybody says.

[Prosecutor]: Okay. I understand that. But that, of course, is your job to decide who you believe and who you don't, right? [Emphasis added.]

The prosecutor's exchange with the prospective juror during voir dire shows that the prospective juror's answers to the prosecutor's questions were somewhat ambiguous. He stated that he would judge the case based on the evidence presented, but also stated that he would hold it against the prosecution if it did not produce scientific evidence. Thus, when viewing the record as a whole, we are not left with a definite and firm conviction that the trial court made a

mistake for this final step of the *Batson* process. As a result, defendant has failed to establish any discriminatory intent on behalf of the prosecutor, and his *Batson* challenge fails.

II. SUFFICIENCY OF THE EVIDENCE

Next, defendant argues that there was insufficient evidence to support his convictions of assault with intent to do great bodily harm less than murder and conspiracy to commit assault with intent to do great bodily harm less than murder. Specifically, defendant claims that there was insufficient evidence to prove that he had the intent to shoot and physically harm anyone. We disagree.

In reviewing a sufficiency of the evidence question, we view the evidence de novo in a light most favorable to the prosecution to determine whether a rational trier of fact could conclude that the elements of the offense were proven beyond a reasonable doubt. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We do not interfere with the jury's role of determining the weight of the evidence or the credibility of witnesses. *People v Bulls*, 262 Mich App 618, 623; 687 NW2d 159 (2004); *People v Milstead*, 250 Mich App 391, 404; 648 NW2d 648 (2002). Importantly, "minimal circumstantial evidence will suffice to establish the defendant's state of mind, which can be inferred from all the evidence presented." *People v Kanaan*, 278 Mich App 594, 622; 751 NW2d 57 (2008).

The elements of assault with intent to do great bodily harm less than murder include the following: "(1) an attempt or threat with force or violence to do corporal harm to another (an assault), and (2) an intent to do great bodily harm less than murder." *People v Parcha*, 227 Mich App 236, 239; 575 NW2d 316 (1997). A criminal conspiracy is a partnership in criminal purposes, under which two or more individuals voluntarily agree to effectuate the commission of a criminal offense. *People v Jackson*, 292 Mich App 583, 588; 808 NW2d 541 (2011). The defendants must specifically intend to combine their actions in order to pursue the criminal objective; the offense is complete upon the formation of the agreement. *Id.* Proof of a conspiracy may be in the form of circumstantial evidence, including the acts and conduct of the parties. *Id.*

Catherine Williams, Ashley Williams, and Chanquiece Moton testified that defendant entered the home armed with a handgun, threatened to kill Ashley Williams, and pursued Ashley Williams through the home while firing shots in her direction. The infliction of an actual wound is not an element of the offense of assault with intent to do great bodily harm less than murder. *Parcha*, 227 Mich App at 239. Furthermore, looking at the evidence as a whole, a jury reasonably could infer that defendant intended to cause great bodily harm to Ashley. *Kanaan*, 278 Mich App at 622; see also *People v Fletcher*, 260 Mich App 531, 562; 679 NW2d 127 (2004). In addition, circumstantial evidence supported a finding that defendant conspired with Youngblood to commit the offense of assault with intent to do great bodily harm less than murder. *Jackson*, 292 Mich App at 588. Contrary to defendant's assertion that all the shots were fired by Youngblood, evidence in the form of witness testimony supported a finding that defendant was a shooter and in fact was the primary and initial shooter. Accordingly, the evidence was sufficient to support defendant's convictions of assault with intent to do great bodily harm less than murder and conspiracy to commit assault with intent to do great bodily harm less than murder.

III. CONSECUTIVE SENTENCING

Next, defendant argues that the trial court abused its discretion by ordering his sentences for first-degree home invasion and conspiracy to commit first-degree home invasion to be served consecutively to the sentences for his other non-felony-firearm convictions. Defendant contends that, essentially, the trial court imposed consecutive sentences to correct the jury's act of acquitting defendant of the original assault with the intent to murder charges. We disagree.

We review a trial court's decision to impose consecutive sentences for an abuse of discretion. *People v St John*, 230 Mich App 644, 646; 585 NW2d 849 (1998). "A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes." *People v Yost*, 278 Mich App 341, 379; 749 NW2d 753 (2008). However, to the extent the imposition of consecutive sentences involves the interpretation of a statute, our review is de novo. *People v Gonzalez*, 256 Mich App 212, 229; 663 NW2d 499 (2003).

"In Michigan, concurrent sentencing is the norm, and a court may impose consecutive sentences only if authorized by statute." *St John*, 230 Mich App at 646. Relevant to the instant case, MCL 750.110a(8) provides that "[t]he court may order a term of imprisonment imposed for home invasion in the first degree to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction." Thus, because defendant was convicted of first-degree home invasion, the court was authorized to make that sentence consecutive to his other sentences. Therefore, the trial court did not abuse its discretion.

Defendant acknowledges the authority granted under MCL 750.110a(8) but nonetheless argues that because co-defendant Youngblood did not receive consecutive sentences, he should not have received them as well. As MCL 750.110a(8) states, a trial court "may" impose consecutive sentencing, and it is well established that the word "may" denotes permissive, not mandatory, action. *Wilcoxon v City of Detroit Election Comm'n*, 301 Mich App 619, 631; 838 NW2d 183 (2013). The trial court exercised its discretion with defendant because of defendant's leadership role in the crimes. Indeed, the evidence showed that defendant was the individual with the motive and reason for the attack, and that he was the leader of the incident. Consequently, we find no error in the trial court's exercising of the authority granted by the Legislature in sentencing defendant to consecutive sentences.

IV. STANDARD 4 BRIEF

Defendant raises two issues in his standard 4 brief, but neither one has merit.

Defendant first claims that trial counsel rendered ineffective assistance by failing to fully investigate and present alibi evidence and by failing to move for an investigator to investigate and testify as to defendant's alibi. Defendant did not move for a new trial or an evidentiary hearing below; thus, our review is limited to mistakes apparent on the record. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002). Generally, to establish an ineffective assistance of counsel claim, a defendant must show that (1) that counsel's

performance was below an objective standard of reasonableness under prevailing professional norms and (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *People v Davenport*, 280 Mich App 464, 468; 760 NW2d 743 (2008).

"Failure to make a reasonable investigation can constitute ineffective assistance of counsel." *People v McGhee*, 268 Mich App 600, 626; 709 NW2d 595 (2005). Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy and the failure to call witnesses only constitutes ineffective assistance of counsel if it deprives the defendant of a substantial defense. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004). "A difference of opinion regarding trial tactics does not amount to ineffective assistance of counsel." *People v Stubli*, 163 Mich App 376, 381; 413 NW2d 804 (1987).

Trial counsel did not render ineffective assistance. Trial counsel obtained the assistance of a court-appointed investigator to travel to Ohio and investigate and procure the evidence asserted by defendant. Trial counsel acted reasonably in procuring the services of an investigator and using the evidence gathered for defendant's defense. Defendant does not indicate what further evidence an investigator could or should have gathered to benefit his case. Accordingly, defendant has failed to establish that counsel's performance fell below an objectively level of reasonableness.

Defendant also claims that his appellate counsel was ineffective for failing to raise the claim of ineffective assistance of trial counsel based on the cumulative effect of trial counsel's errors.

"The test for ineffective assistance of appellant's counsel is the same as that for trial counsel." *People v Pratt*, 254 Mich App 425, 430; 656 NW2d 866 (2002). Appellate counsel may deliberately reject weak arguments in order to focus on stronger arguments. *People v Uphaus*, 278 Mich App 174, 186-187; 748 NW2d 899 (2008).

Defendant's assertion that trial counsel rendered ineffective assistance has no merit, and defendant could not have been prejudiced by appellate counsel's failure to raise the issue. First, any error was cured by defendant raising the issue himself in his standard 4 brief. Second, and more importantly, as we have discussed, defendant has failed to establish the existence of any error. And because there are no errors to cumulate, "a cumulative effect of errors in incapable of being found." *People v Mayhew*, 236 Mich App 112, 128; 600 NW2d 370 (1999).

Affirmed. But we note that in our review of the judgment of sentence, we discovered that defendant's felony-firearm sentences were made consecutive to all of his other sentences, including his conspiracy sentences. Because a sentence for a felony-firearm conviction generally is only served consecutively to the sentence for the underlying felony, MCL 750.227b; *People v Clark*, 463 Mich 459, 463, 464; 619 NW2d (2000), we remand for the ministerial task of

correcting the judgment of sentence to provide that the sentences for defendant's conspiracy convictions are to run concurrently with his sentences for felony-firearm. We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Pat M. Donofrio
/s/ Stephen L. Borrello